ENVIRONMENT CRIME IN CONTEXT: FROM *SPCC v CALTEX* TO DATE[*]

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Justice Stein was sworn in as a judge of the New South Wales Land and Environment Court in June 1985. Justice Stein was not one of the original judges – the court had been operating for some four years before he joined it. But he came at a critical time. The jurisprudence was still in its infancy. Many of the principles developed by the court were identified by Justice Stein. His grasp of the contemporary issues facing our environment and his capacity to reflect them with clarity in his usually short but comprehensive judgments ensured that his approach to many problems would become an essential principle of environmental law.

Throughout all of our adult lifetimes the appropriate use of our natural and man made resources has proved a divisive issue. I doubt that any sensible person would suggest that we should not create a built environment appropriate for our needs and reflective of the aesthetic values which prevail in our community. At times those values may not be in harmony across the entire community. The individual aspirations of some may clash with the

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aesthetic ideals of others. Although we accept and encourage diversity we all have a threshold beyond which the diverse becomes the discordant. These issues are generally resolved through processes which provide for a decision to be made by an elected person or their delegate. There is a contemporary debate about whether those processes are appropriate, but that is a topic for another day.

The built environment is of fundamental significance to our everyday lives. The natural environment is fundamental to life itself. The contemporary controversies concerned with water, air and the maintenance of a diverse ecological order are all issues of the latter part of the 20th century. And for that reason the philosophical divide which is reflected in the debate surrounding them is not uncommonly a reflection of the generational divide between those on either side of the debate. The debate is fuelled by a lack of knowledge. Until World War II the fundamental assumption in our community was that there were sufficient resources available to ensure the health and wellbeing of all without any need to consider issues beyond the cosmetic impact upon the environment. As children we read books with pictures confirming the marvels created during and since the industrial revolution. Our comfortable assumptions are now being challenged. It is fortuitous that we meet to consider these issues today when the leaders of the world are to meet in Copenhagen to consider the issue of climate change. Whatever were the comfortable assumptions about the world which we inherited as children the issues surrounding climate change have in less than a generation become the central issue not only for the natural environment but for the equitable

distribution of the world's resources between countries, and, accordingly individuals. The questions for our generation are the questions for the ages. Every person depends to a greater or lesser degree on the availability of energy to live. Ensuring that the source of the energy does not impose unacceptable burdens on the environment is now the primary imperative of all.

The rule of law is fundamental to a civilised society. The rule of law is a different concept to rule by law. Where the rule of law prevails rules will exist which provide both guidance and control of an individual's conduct. Before corporations existed rules were made which applied to individuals. The development of corporate entities required the development of new rules and new methods to enforce them.

Together with the changes in the New South Wales planning system provided by the *Environmental Planning and Assessment Act* came very significant changes in the rules by which man made impacts on the environment are controlled and enforced. It is accepted in our community that where society requires particular behavioural norms to be followed and forbids others, rules that provide punishment for those who break them are necessary. To enforce those rules we have created a system of criminal justice which, although developed by the judges, is now significantly controlled by statute. Environmental laws are of course enforced by the courts. Where appropriate, breaches are prosecuted in summary proceedings. The parliament has provided for a fine for an individual or corporation or if the breach justifies it,

the incarceration of an individual as a penalty. The legislative structure does not provide for juries.

I was asked by the organisers of this conference to examine the principles identified by Justice Stein and ultimately defined by the High Court in *State Pollution Control Commission v Caltex Refining Co Pty Ltd*.[1] This is but one example of the contribution Justice Stein has made to the development of environmental law in this State. Justice Preston has spoken of Justice Stein's contribution to the principles of sustainable development and the precautionary principle in *Leatch v National Parks and Wildlife Service*[2] and this session is to be followed by a discussion of access to environmental justice including Justice Stein's decision in *Oshlack v Richmond River Council*.[3] In each of these areas, but there are others, Justice Stein identified the relevant principles and with the clarity of his judgment writing stated them in a manner which ensured their acceptance by both lawyers and the general community.

Because many potentially polluting activities are conducted by corporations it was inevitable that the criminal jurisprudence relevant to corporate crime would be re-examined. Principles which had been developed to prosecute and protect individuals may not be appropriate for corporations with access to resources not available to the ordinary citizen. This presented a challenge for

[1] (1991) 72 LGRA 212 ("SPCC v Caltex").

[2] (1993) 81 LGRA 270.

[3] (1993) 82 LGRA 186.

the courts. As we all appreciate the response from judges when asked to reconsider accepted principles will not be uniform. Remarkable as it would seem to the ordinary person judges who each claim to be correctly applying principle can arrive at different conclusions. The law is a construct of ideas identified and incorporated in principles accepted by judges as appropriate at a given time. The principles relevant to the privilege against self incrimination and their relevance to corporations are an illustration of how the law works. And as with all human endeavours coincidence has a role to play.

The privilege against self-incrimination – a fundamental principle

The privilege against self-incrimination is reflected in the latin maxim *nemo tenetur accusare seipsum*: "no person is bound to accuse himself". It was described in 1856 as "a maxim of our law as settled, as important and as wise as almost any other in it."[4] More recently the privilege has variously been described as a "cardinal principle of our system of justice"[5], a "bulwark of liberty"[6] and "fundamental to a civilised legal system".[7]

The privilege against self-incrimination is often confused and described interchangeably with the "right to silence". The two concepts are not equivalents. The privilege against self-incrimination provides an immunity from

[4] *R v Scott* (1856) Dears & B 47 at 61; 169 ER 909 at 915 per Coleridge J.

[5] *Sorby v Commonwealth* [1983] HCA 10; (1983) 152 CLR 281.

[6] *Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9; (1983) 152 CLR 328.

[7] *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at 420 per Kirby P.

compulsion of providing self-incriminating information. It is but one of an associated group of rights which comprise the "right to silence."

Each of these immunities differs in its origins, application and effect. Each developed independently to provide citizens with protection against the coercive powers of the State in various contexts. In *R v Director of Serious Fraud Office; ex parte Smith*[8] the House of Lords adopted the following definition of these rights; the privilege against self-incrimination appearing at sub-paragraph (2):

> "In truth [the privilege against self-incrimination does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified:
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> (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
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> (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
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> (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
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> (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
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> (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

[8] [1993] AC 1 at 30 – 31per Lord Mustill.

(6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure

(a) to answer questions before the trial, or

(b) to give evidence at the trial."

Origins

The privilege against self-incrimination, along with the many of the additional rights described in *Ex parte Smith* were developed by the common law through the 16th and 17th centuries at a time when the power of the State over an individual was at its height. The scope for abuse and subjugation of individuals was significant. Despite the statutory modification of the privilege (amongst other fundamental rights) by legislative intervention, its common law origins continue to inform the contemporary approach.

The Courts of Star Chamber and High Commission

Unlike some other fundamental elements of the common law, the privilege against self-incrimination cannot be easily traced to its source. The generally accepted view is that the privilege has its origin in the "odious procedure"[9] of the Star Chamber in England under the reign of Henry VII. The privilege was developed as a response to the excesses of the Courts of Star Chamber and High Commission in Ecclesiastical Causes. Ironically, bearing in mind contemporary imperatives, the Chamber was originally well regarded for the efficiency with which it was able to resolve the matters that came before it. Its outcomes were a result of the application of coercive powers against the

[9] *Sorby v The Commonwealth of Australia and Others* (1983) 152 CLR 281 at 317.

individual citizen, who had little if any capacity to resist the powers of the state. It is a circumstance reflected in the history of almost every nation. The power of the state brings order but at a cost to the rights and liberties of individuals. By the reign of Charles I, the Chamber was notorious for the broad unchecked powers that it possessed and lack of the collective rights we describe today as due process.

The procedures adopted at that time, included the taking of the ex officio, or inquisitorial, oath as part of an investigation. That procedure required the accused to swear an oath to answer any questions which might subsequently be put to him. The use of the ex officio oath was a powerful mechanism:

> "… in those days of strong religious beliefs and a strong church, the oath assumed a much greater importance than it does today; it was, like torture, a form of compulsion. It was the spiritual consequence of lying on oath, more than the risk of perjury, which compelled the truth."[10]

The consequence was that a person could be compelled by the Court to give testimony which tended to incriminate themselves, without any protection from that evidence being used against them. Refusal to take the oath would commonly result in the accused being imprisoned for contempt or subjected to other harsh penalties.

Charles I was forced by political and military imperatives to summon the Parliament in 1641. The courts of Star Chamber and High Commission were

[10] Davies, the Hon Justice GL, "The Prohibition against Adverse Inferences from Silence: A Rule without Reason?" Part 1, (2000) 74 *Australian Law Journal* 26 at 32.

abolished and the ex officio oath prohibited. The traditional view is that these events were central to the development of the principle that no person should be forced to condemn themselves and marked the introduction of the right of the individual not to speak at all in proceedings that were not being conducted against them:

> "By the second half of the seventheenth century, the privilege was well established at common law, which affirmed the principle nemo tenetur accusare seipsum or 'no man is bound to accuse himself'.
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> Historically, the privilege developed to protect individual human persons from being compelled to testify, on pain of excommunication or physical punishment to their own guilt."[11]

It is also believed that the privilege was developed "to ensure that European inquisitorial procedures would have no place in the common law adversary system of criminal justice."[12] The privilege is thought to be linked "with the cherished view of English lawyers that their methods are more just than are the inquisitional procedures of other countries."[13] For many people that debate continues today sometimes with renewed vigour.

The character of the privilege has changed significantly from its origins. Originally a privilege not to speak against oneself, it evolved to become a privilege not to respond or testify at all. It has been suggested[14] that the right

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[11] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 497-498.
[12] *Azzopardi v R* (2001) 205 CLR 50 at 91.
[13] *Rees v Kratzmann* (1965) 114 CLR 63 at 80.
[14] J H Langbein (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to Eighteenth Centuries", Chapter 5 in *The Privilege Against Self Incrimination*, University of Chicago Press: Chicago, pp 82-108.

of the accused not to speak presupposes an effective right to have another speak on their behalf. That right came with the introduction of defence counsel in the latter part of the 18th century.

Regardless of its precise origin, the principle has been characterised as a substantive right[15] that is "so deeply ingrained in the common law"[16] that unless it is specifically abrogated by statute or waived by the party to whom the privilege applies, the person is entitled to rely upon it to their benefit.

The modern expression of the principle entitles a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person.[17] The privilege is built upon a number of rationales, the most common of which are the prevention of abuses of power, protection from the accusatorial system of justice, the protection of the quality of evidence and the preservation of human dignity and privacy. The privilege avoids what was described by McHugh J as the "cruel trilemma".[18] An accused cannot be forced to choose between refusing to give evidence and being punished for contempt, giving truthful evidence and incriminating themselves, or giving false evidence and risking punishment for perjury.

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[15] *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 508.

[16] *Sorby* at 309 per Mason, Wilson and Dawson JJ.

[17] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR at 328, 335.

[18] See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 498.

The privilege was developed at a time when literacy rates were poor and legal representation inadequate or non-existent. Communities were smaller and gossip and innuendo were readily communicated by word of mouth and was known to those involved in the administration of the justice system. The jury came to provide the decision in the great majority of criminal trials and most civil trials. The social, cultural and political landscape has changed significantly since those early days.

It will be obvious that the assertion of the privilege has the potential to frustrate other legitimate interests, including the enforcement of the rights of another party, or the exercise of investigatory and enforcement powers by regulatory bodies. Along with other safeguards developed by the common law, the privilege has the potential to inhibit the search for truth. However this has for generations been accepted as a justifiable cost in providing a fair trial for an individual.

It is now evident that the privilege in all its manifestations is no longer accepted. At least by the time a matter comes to trial the privilege has been modified by statute. The “defence disclosure” provisions introduced in the United Kingdom, contained in *Criminal Procedure and Investigation Act* 1996 (UK) and Victoria in the *Crime (Criminal Trials) Act* 1999 (Vic) provide scope for the Court to order that both the prosecution and the defence outline their respective cases in advance of the trial. Adverse inferences can be drawn from the introduction of evidence during the trial which was not disclosed prior

to the hearing. In New South Wales the *Criminal Procedure Amendment (Case Management Bill)* 2009, which now forms Pt 3 Div 3-4 *Criminal Procedure Act* (1986) empowers a judge to require an accused person to identify the issues to be litigated in a criminal trial. If silence was once golden it is no longer absolute.

The principle developed at a time when the concept of a corporation, as a distinct legal entity with rights and obligations independent of the natural persons who controlled it, had not been envisaged. The vast majority of commercial activity is now conducted by bodies corporate. The 19th century was a time when the corporation as an emerging legal "person" challenged the law to develop principles by which they were governed and their rights created. In the 20th and now the 21st century, the emphasis has shifted significantly toward ensuring that corporations are responsible and accountable to the community for their actions. The rights of corporations have been curtailed, and the obligations upon them and the individuals who control them have become more onerous. A recent example is found in the creation of criminal sanctions for those who engage in anti-competitive conduct in the form of cartels.

The decision in *SPCC v Caltex*

When Justice Stein gave judgment in *SPCC v Caltex* it caused a stir amongst practitioners. As was the case with a number of Justice Stein's decisions the traditionalists responded with muted outrage. Others saw it as an inevitable

development of the common law. Justice Stein held that the privilege against self-incrimination in criminal proceedings does not extend to corporations. A contemporary practitioner is likely to ask how could it be otherwise. Why should a corporation, at least one that is accused of breaching an environmental law not be required to respond to questions asked of it even if the answer reveals a criminal act. The power of the State and the power of many corporations are likely to be equal and in many cases favour the corporation.

Proceedings in the Land & Environment Court

Caltex was charged with eleven offences allegedly committed variously during December 1989 and January 1990 in contravention of the *Clean Waters Act 1970* and the *State Pollution Control Commission Act 1970*. It was alleged that Caltex had polluted the waters of Yena Gap at Botany by discharging oil and grease into the water, in contravention of a pollution control licence which it held.[19] Caltex pleaded not guilty to the charges. After the commencement of the prosecution the defendant was served with notices to produce documents on two bases; under the *Clean Waters Act* and under the relevant rules of the Land and Environment Court. The notices were served on Caltex for the purpose of using the documents in the prosecution that had commenced.

[19] Following appeals to the Court of Criminal Appeal and the High Court on the privilege point, nine of the charges against Caltex (five under the *Clean Waters Act* and four under the *State Pollution Control Commission Act*) were ultimately withdrawn. Caltex pleaded guilty, was convicted and fined a total of $15,000 in respect of the two remaining charges: *Environment Protection Authority v Caltex Refining Company Pty Limited* (Land and Environment Court of New South Wales, Stein J, 21 July 1994, unreported).

The defendant sought to have the statutory notices set aside, submitting that it was protected by the common law privilege against self-incrimination. Justice Stein held that the privilege does not extend to corporations.

The debate revealed the divergence in the jurisprudence in the United States and England. The United States view was that the privilege did not extend to companies and was only available to individuals. That principle was first articulated in the United States in *Hale v Henkel*[20] where the Court said that, "[W]e are of the opinion that there is a clear distinction ... between an individual and a corporation, and ... the latter has no right to refuse to submit its books and papers for an examination at the suit of the State."[21] The court considered that the right had never been available to a corporation. The decision of the Supreme Court in *United States v White*[22] expanded the principle. The court controversially held that a trade union was a collective entity and accordingly was not entitled to the protection of the Fifth Amendment to the United States Constitution. The Court in *White* articulated what was described as the "collective entity" rule at p. 1252:

> "The test ... is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity. Labor unions-national or local, incorporated or unincorporated-clearly meet that test."

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[20] 201 U.S. 43; 26 S.Ct. 370 (1906).

[21] Hale at 74

[22] 322 U.S. 694; 64 S.Ct. 1248 (1944).

The scope of the privilege was further narrowed in the United States in *Bellis v United States*[23] where the Supreme Court held that a partner in a small partnership could not refuse to produce partnership records in reliance on the privilege. The Court examined the form of the partnership and observed that it had many of the incidents which were found in prior "collective entity" decisions. The Court suggested that the test articulated in *White* for determining the applicability of the Fifth Amendment to organizations was "not particularly helpful in the broad range of cases."[24] The Court rejected the notion that the "formulation in *White* can be reduced to a simple proposition based solely upon the size of the organization. It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." The petitioner, *Bellis*, held the partnership's financial records in "a representative capacity" and therefore, "his personal privilege against compulsory self-incrimination is inapplicable."

The reasoning of the Supreme Court of the United States proved crucial to the development of the Australian jurisprudence.

The established position in England was that there was no distinction between natural persons and companies in relation to the privilege. The leading case was *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd*[25], where in a case of criminal libel the Court of Appeal was required to resolve

[23] 417 U.S. 85; 94 S.Ct. 2179 (1974).

[24] At 2189

[25] (1939) 2 KB 395.

an issue concerning interrogatories served on a company. The Court held that there was no distinction to be drawn between a company and an individual, The Court observed at 408 – 409:

> "…on principle one cannot see any reasonable ground for the support of the view that this claim of privilege should be limited to natural persons and that it could not be taken advantage of by a corporation.
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> …
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> It is true that a company cannot suffer all the pains to which a real person is subject. It can, however, in certain cases, be convicted and punished, with grave consequences to its reputation and to its members, and we can see no ground for depriving a juristic person of those safeguards which the law of England accords even to the least deserving of natural persons. It would not be in accordance with principle that any person capable of committing, and incurring the penalties of, a crime should be compelled by process of law to admit a criminal offence."

Triplex Safety Glass was applied by the House of Lords in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation*,[26] although not without some criticism. The English position proved persuasive, with several decisions of Australian courts applying *Triplex* and extending the privilege to corporations. The privilege has also been held to extend to companies in Canada[27], New Zealand,[28] and Hong Kong.[29]

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[26] [1978] AC 547.

[27] *Klein v Bell* [1955] 2 DLR 513.

[28] *Apple & Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191.

[29] *Salt & Light Development Inc v SJTU Sunway Software Industry Ltd* [2006] 2 HKLRD 279, [2006] HKEC 697.

Until *Caltex* there had been limited discussion of the issue in Australia. In the High Court Murphy J had expressed a view in obiter on several occasions that the privilege should not extend to companies.[30] Murphy J reasoned that the privilege against self-incrimination was based upon a desire to protect personal freedoms, which is a right that should not extend beyond natural persons.

Justice Stein accepted the opinion of the Supreme Court in *United States v White*, where Murphy J, with whom Roberts, Frankfurter and Jackson JJ agreed:[31]

> "The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him."

Justice Stein then observed (at 219):

> "The judgements of Murphy J in *Pyneboard*, *Rochfort*, and *Controlled Consultants* are also persuasive. Read in conjunction with the history of the development of the privilege against self-incrimination, expounded by Brennan J in *Sorby*[32] leads me to favour the view that the privilege against self-incrimination was always intended to be and remains a personal one. Nothing in

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[30] *Pyneboard Pty Ltd v Trade Practices Commission; Dunlop Olympic Ltd v Trade Practices Commission* [1983] HCA 9; (1983) 152 CLR 328 at 346-347; *Rochfort v Trade Practices Commission* [1982] HCA 66; (1982) 153 CLR 134; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* [1985] HCA 6; (1985) 156 CLR 385. The other members of the Court in those cases considered it unnecessary to determine the issue.

[31] 322 US 694 (1944).

[32] *Sorby v Commonwealth* [1983] HCA 10; (1983) 152 CLR 281 at 316-319.

> the history of the privilege and the reasons for its development justifies its extension to artificial persons such as corporations or trade unions. I prefer the analysis of the United States Supreme Court of the nature of corporations. To my mind there is no satisfactory policy rationale to extend the privilege beyond natural beings to entities which are the invention of the State and cannot be punished by the deprivation of liberty."

Whilst acknowledging the confined role of judges at first instance in the development of legal principle and the significance of the issue being considered, Justice Stein said (at 219):

> "It seems to me that acknowledging the status of a first instance judge and also the need for the issue to be determined by an appellate tribunal, preferably the High Court, it would nonetheless be an excessive exercise in judicial timidity or reticence not to state my opinion and so rule."

Justice Stein reminded us all at his farewell speech in the Banco Court of the significance of the judicial oath. As Caltex reveals it was, as it must be, fundamental to his judicial decision making.

Appeal to the Court of Criminal Appeal

Justice Stein's decision was unanimously overturned in the Court of Criminal Appeal.[33] The decision in that court is illustrative of a controversy in judicial decision making which has been apparent in Australian law for at least 30 years. I refer to the "top down reasoning" of which David Ipp said in his farewell speech:

[33] *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 (Gleeson CJ, Mahoney JA and McClelland J.

> "Civilian lawyers prefer a unified theory of law and, I confess, so do I. I have always believed that if Albert Einstein thought that a single unified theory could explain the entire universe simple, comprehensible legal principles of overarching application should not be beyond our wit. I recognise, however, that this is contrary to the current orthodoxy which eschews top-down reasoning, focuses on historical purity and holds that judicial decision-making should only move with baby steps away from the umbrella of authoritative canonical cases. This approach has produced an excess of subtlety and complexity and nowadays there are few aspects of legal principle that can be understood by ordinary people - an odd phenomenon in a country that prides itself on being a democracy governed by the rule of law.
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> It should not be forgotten that simplicity, commonsense and adaptation to change are not alien concepts, they are part of the traditional pragmatism of the common law. Where necessary, our law has not been afraid to take great leaps forward leaving established principle far behind: Donoghue v Stevenson, Hedley Byrne, High Trees and Anisminic are but a few examples of this. Maitland's aphorism remains pointedly relevant: "Today we study the day before yesterday in order that yesterday may not paralyse today and today may not paralyse tomorrow."

In the Court of Criminal Appeal Gleeson CJ, (with whom Mahoney JA and McClelland J agreed) reviewed the origins of the privilege and the historical rationales supporting it. The Chief Justice said at p 127:

> "First, it is an aspect of individual privacy and dignity. To this extent I respectfully agree with Murphy J. Where I part company with his Honour is in regard to what I consider to be the incompleteness of his justification of the privilege. It has two other main purposes. One of them is that it assists to hold a proper balance between the powers of the State and the rights and interests of citizens. In that term I include what are commonly described as "corporate citizens". Modern companies are frequently reminded that they have duties of citizenship. I accept that; but I also consider they have rights of citizenship, and the holding of a proper balance between these rights and the power of the State is a concern of the courts. I also include citizens who have an interest in corporations as members. The third purpose to which I refer is that the privilege is a significant element maintaining the integrity of our accusatorial system of criminal justice, which obliges the Crown to make out a case before an accused must answer. It is closely related to, although

> not co-extensive with, the right to silence: cf *Petty v The Queen*. It constitutes a part of what we accept as "due process": cf *Adler v District Court of New South Wales*. In those two last respects the rationale of the privilege is just as applicable to corporations as to individual persons."

The Court continued at 128:

> "Finally, in modern times, probably the majority in number of corporations are one or two-person, or family, companies, and I see no justification in principle for distinguishing them from natural persons in relation to the privilege here in question. The Solicitor-General does not suggest that his argument only applies to large corporations. The United States approach denies the privilege to partnerships as well as to corporations: *Bellis v United States* 417 US 85 (1974). That seems necessary as a matter of consistency, bearing in mind that for many people who carry on business or professional activities the choice between a corporate or a partnership structure is dictated by considerations which have little or no relevance to the issue presently under consideration."

The Court held that the privilege was available to Caltex. The Environment Protection Authority appealed that decision to the High Court.

Appeal to the High Court

The High Court upheld the appeal by a majority of four to three. Coincidence played its part.

Mason CJ and Toohey J reviewed the authorities from the common law jurisdictions and discussed the historical and modern rationales in support of the privilege. Their Honours recognised a distinction between natural persons and corporations at pp. 499-500:

> "Neither the fact that the privilege had its origin in the necessity of protecting human beings from compulsion to testify on pain of excommunication or physical punishment nor the modern justification of discouraging ill-treatment of individuals and dubious confessions requires that the privilege be available to corporations. Although corporations are susceptible to punishment, whether by means of imposition of fines or sequestration, they cannot suffer physical punishment. Nor can they testify or be required to testify except through their officers. Consequently, the historical reasons for the creation and recognition of the privilege do not support its extension to corporations. Likewise, the modern and international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument for holding that corporations should enjoy the privilege.
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> …
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> With respect to the first basis, we reject without hesitation the suggestion that the availability of the privilege to corporations achieves or would achieve a correct balance between state and corporation. In general, a corporation is usually in a stronger position vis-a-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons. The doctrine of the corporation as a separate legal entity and the complexity of many corporate structures and arrangements have made corporate crime and complex fraud one of the most difficult areas for the state to regulate effectively."

Their Honours observed at p 504 "the availability of the privilege to corporations has a disproportionate and adverse impact in restricting the documentary evidence which may be produced to the court in a prosecution of a corporation for a criminal offence."

Their Honours concluded at p 508:

> "Ultimately, it is clear that the rationales for the availability of the privilege against self-incrimination to natural persons, both historical and modern, do not support the extension of the privilege to artificial legal entities such as corporations. The privilege in its modern form is in the nature of a human right,

> designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them. In respect of natural persons, a fair state-individual balance requires such protection; however, in respect of corporations, the privilege is not required to maintain an appropriate state-individual balance. Nor is the privilege so fundamental that the denial of its availability to corporations in relation to the production of documents would undermine the foundations of our accusatorial system of criminal justice."

Deane, Dawson and Gaudron JJ dissented, holding that the privilege was available to corporations and had not been abrogated by the statute. Their Honours considered the origins of the privilege against self-incrimination, and observed that the immunity of an accused person from being compelled to produce documents that might incriminate them may rest more on the principle that the prosecution bears the onus of proving its case in an accusatorial system, rather than on the privilege against self-incrimination per se. Their Honours acknowledged the common origins of the two principles, arising from an aversion to the inquisitorial process. And although recognising that a change in the law may be justified they decided that if it was to occur the change should be made by the legislature. Their Honours said:

> "As we have said, the privilege may be abrogated or modified by statute. And in the case of corporations some may think that justifiable because the privilege is purely a human right. But in reality, the prevailing reasons are likely to be more pragmatic as, it would seem, are the reasons for giving to the Fifth Amendment in the United States a scope which excludes corporations. The complex corporate structure which the corporate investigator nowadays so often faces makes detecting and prosecuting corporate crime increasingly difficult, and sometimes well-nigh impossible, without access to more effective procedures than the traditional methods such as search and seizure. Nevertheless, a statutory intention to modify or abrogate a common law right, such as the privilege against self-incrimination, must emerge clearly, whether by express words or necessary implication. When it does the courts must give it effect.

…

> If, as it seems to us, the desire to deny the privilege against self incrimination, whether to natural persons or corporations or both, tends to be dictated by pragmatism rather than principle, then the extent of any denial is more appropriately a matter for the legislature than the courts. We can find no sufficient reason in principle for saying that the doctrine, as it has developed in our law, has no application to corporations. Thus in the present case, which is a criminal prosecution against the respondent, there is no reason why the respondent may not successfully invoke the privilege against the notice to produce documents given pursuant to the rules of the court."

As you know since *Caltex* the Uniform Evidence law has removed the privilege for corporations. It seems odd that a principle which passes without comment today occasioned such controversy at the time.

Criminal law as part of an environmental protection regime

Protection of the environment has not traditionally been the province of the criminal justice system. Although criminal penalties have always formed part of the Australian environmental protection regime, the introduction of criminal sanctions as a response to breaches of environmental legislation (predominantly relating to pollution) is a recent phenomenon when compared to the long history of the common law in respect of offences against persons and property.

At first, offences committed against the environment were not considered to be "real" crimes, rather they were seen to be "not criminal in any real sense,

but… which in the public interest are prohibited under a penalty."[34] Like other "non-traditional" areas of the criminal justice system, which include the majority of corporate or "white collar" crimes, the perpetrators do not fit within society's traditional perceptions of criminal offenders. The reality is that the harm to our community by breaches of laws in non-traditional fields of criminal activity may far outweigh the cost of more traditional crimes". The position is changing, although the change is not universally recognised. As the community becomes more aware of the cost of a polluted and degraded environment the preparedness to recognise environmental offenders as criminal is likely to increase.

In part the perception of environmental crime is a result of the penalties which have been provided. Traditionally punished by monetary penalty, rather than incarceration, the penalties imposed have generally been modest and easily absorbed, at least by major corporations. Although Ministers of the Environment have proclaimed increased maximum penalties with enthusiasm, the courts have rarely determined that a penalty other than one at the lowest end of the range provided by the statute is appropriate.

Recourse to the principles of criminal law has contributed to the rapid development in the latter half of the 20th century of the new discourse referred to as environmental or "green" criminology. Although not promoting a "new" theoretical framework as such, efforts have been made to provide an

[34] *Sherras v De Rutzen* [1895] 1 QB 918 at 922.

alternative perspective, placing emphasis on the nexus between the nature of environmental harm and traditional considerations of regulation, enforcement and crime prevention.[35] Given the range of activities and their effects which can be labelled "environmental crime", there is a concern to measure in a useful way the true extent of environmental harm from impacts which are not reported, not documented or not appreciated as constituting a crime. It is argued that to adopt a strictly legal concept of environmental harm, which is limited to acts defined as criminal, fails to appreciate the impact of harms that are legal and "legitimate" but which nonetheless negatively impact the environment.[36]

Any discussion of the role of criminal law in the protection of the environment must commence with the search for a unifying principle. Could it be "sustainability"? Adoption of a unifying principle allows the effective definition of environmental issues and the provision of penalties which fit the particular crime. Unless a unifying principle is acknowledged environmental crimes are a disparate collection of activities which we may not like with a range of penalties which may not reflect the criminality of those who commit them. Confidence in and acceptance of environmental crimes as a legitimate field of criminological discourse requires a unifying principle.

As with most prosecutions of alleged corporate offenders by regulatory agencies which have finite resources, the cost of a prosecution which may

[35] White, R. (2008) "Crimes Against Nature", Willan Publishing: Devon, p 3.
[36] Lynch and Stretesky (2003) "The Meaning of Green: Contrasting Criminological Perspectives" *Theoretical Criminology 7*(2) pp 217-238, cited in White, above n 35 at 182.

attract one or more appeals, is a limiting factor in itself. Environmental agencies are not unique in this respect (*ASIC v Rich* is a recent example, albeit in relation to an individual). Many corporate and indeed, some individual defendants, are well resourced with a capacity to defend a prosecution whatever the cost. As a consequence it is suggested that large defendants may be less likely to be prosecuted and smaller organisations are more likely to have proceedings commenced against them.

I do not have the time to explore these issues further today. However, as the result in the last federal election makes plain the protection of the natural environment is an ideal of increasing significance to our community. Whether it be illegal land clearing, pollution of waters or the unauthorised use of urban premises the rules must be fashioned to discourage the would be wrongdoer. Whether the conventional weapons of the criminal law are either adequate or appropriate or whether new rules should be defined are complex questions. To answer them the law requires people with the intellectual rigour and understanding of the issues which Justice Stein brought to his work as a judge.

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